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IN THE

Supreme Court of the United States

October Term, 1960

No. 514

MICHAEL STONE,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Government on page 2 of its memorandum says:

> "2. Whether an error relating to Count I of a two count indictment was so prejudicial as to require reversal of conviction on Count II."

In arguing the point in question at page 8, the solicitor general's brief reads:

> "The fact that after conviction the petitioner thought of other explanations to account for the payments reflected in the books does not show that the jury was wrong in accepting what the books reflected and what the petitioner and his wife themselves indicated the books reflected—repayments of loans.

Moreover, the fact that, with respect to this o[ver]-man business, a new explanation of the repayments was attempted on appeal and, when that failed, a totally inconsistent theory was offered on rehearing (see the Statement, supra) hardly carries conviction as to the merits of the new theories."

The attention of the Court is called to the fact that in the decision of Court of Appeals for the Second Circuit, that Court said:

"Whether or not the conviction on Count 1 should be reversed on this ground although no proper request was made or exception taken, Fed. R. Cr. Proc. 52 (b), it would have to be on the ground of the refusal of defendant's request for the grand jury minutes of his testimony. Stone took the stand in his own defense. Although admitting knowledge of some minor shortages in dresses, he denied that 1,800 were missing, saying this was simply what the accountants told him. The government sought to impeach this testimony by reading Stone the following question and answer from his grand jury testimony:

"Q. Now, at the time the petition was filed in June of 1955 a shortage of approximately 1860 dresses was found? A. Yes."

The Court then says:

"We disagree. Inspection of the minutes, a copy of which this Court caused to be submitted to appellant's counsel for comment in his reply brief, reveals inter alia the questions and answers reproduced in the margin. We cannot be certain that this objective demonstration of the consistency of Stone's trial testimony with what he had said before the grand jury would not have been far more effective than what the trial jury may well have regarded as an invented and self-serving explanation.

See United States v. Zborowski, 271 F. 2d 660, 667 (2d Cir. 1959). Indeed, the prosecution should not have opposed defendant's request for the minutes.

as the Assistant United States Attorney who argued the appeal frankly conceded.

If the conviction is to stand, it must thus be on the basis of Count 2."

At page 364 of the minutes of the trial there appears the following:

"The Court: There is no such intimation. He has explained it in the way it has been explained.

Mr. Palmer: Then I take an exception to your not giving the minutes only of the witness on the stand.

The Court: All right, I have ruled. Please continue."

Again turning to the brief for the United States in opposition, that brief quotes as follows (p. 8):

"It is true that the court found that as to one item of his testimony—the petitioner's statement as to his awareness of the shortage of dresses—his testimony before the grand jury was not inconsistent with his testimony of the trial. But even as to Count I, this consistency did not serve to counteract other testimony that the petitioner must have known of, and caused, the shortage. As to the loans involved in Count II, as set forth above, the attempted explanation which both the petitioner and his wife offered at the trial to the effect that repayments to the wife were in fact repayments to other lenders in itself was an admission that the statement of affairs was false."

An examination by the jury of the books of the Bankrupt marked in evidence would have disclosed the fact that there was a full page of items of loans and exchange accounts, but the jury stated on page 481, of the record, of the trial the following:

"The Court: Well, I will read this note. They want all exhibits excepting books, and the indictment.

There is a period after books, so I suppose they want the indictment. Get those ready then.

Any objection, Mr. Palmer?

Mr. Palmer: No, no objection.

The Court: Get the exhibits which are in the form of papers rather than books and then mark this as a court exhibit.

(Marked Court Exhibit 1.)"

Under the circumstances, the jury who could have seen that the itemization in the statement of affairs which referred plainly and in large caps to the fact as per the books of account that there was such a hetrogeneous mass of items, that Michael Stone in connection with his answer to these questions could not have any possible intention of misleading the jury or misleading the creditors.

As a matter of fact, the testimony plainly discloses the fact that immediately after the petition was filed and a meeting of creditors was called at the New York Credit mens' Association, all of these records, books, etc., were turned over to the creditors and their accountant who admitted that these items appeared in the books so turned over to him, who took over possession of the Ellen Jose Fashions, Inc. Under these circumstances, is it proper to believe that if a conviction on the first count to the concealment of assets would have been set aside if there was no second count, on which the punishment to sustain a verdict on the second count was not similar to the punishment meted out on the first count, that such a conviction would have stood? Is it not prejudicial that the verdict on the second count, which was used to sustain the verdict on the first count would not have been sustained if it were not for the fact that the jury had found, from the expressions of the Court, the District Attorney and the references to the Grand Jury minutes concerning the testimony of Michael Stone at that point showed that he was a person who had perjured himself before the Grand Jury and had attempted in the District Court to wheedle him-

out of the alleged position that he had taken before the Grand Jury? Does what happened to bring about the sustaining of the verdict on the first count have no bearing on the subject of prejudicial error? Can it be said that the jury while remaining in session and there were women on the jury, up to 10:10 P. M., on Friday night, were not prejudiced by the fact of that alleged perjury before the Grand Jury, that the atmosphere that permeated the jury room concerning the defendants' guilt or innocence was not influenced by the improper direction of the Trial Court to refuse the minutes of that Grand Jury of Michael Stone's testimony to his counsel. Even the Circuit Court of Appeals, as noted above, after the hearing of the argument on the appeal, decided that the Grand Jury's minutes should be shown to the defendant's counsel so that the brief offered to the Court after the consideration of these minutes should include the error complained of.

The same testimony discloses the fact that the jurors came back again to the court at 5 P. M., and the following took place:

> "The Court: I received this note at approximately 5 P. M.:
>
> 'We would like to have the court reporter read the whole testimony of Mr. Stone.'
>
> Mark this as a court exhibit.
>
> (Marked Court's Exhibit 2.)
>
> (Jury present.)
>
> The Court: Mr. Foreman, I have your note in which you ask apparently for the reading of the whole testimony of Mr. Stone. Do you want the colloquy or just the testimony?
>
> The Foreman: Well, as we figured it out, the testimony. I don't know how long it would take, but if you think you could cut it down—
>
> The Court: It will probably take quite a bit of time, but that is all right. We will read the testimony and leave out the colloquy then. Do you want the colloquy? That is the argument of the lawyers.

The Foreman: No, just the testimony.

(Testimony read.)

The Foreman: I was going to say that perhaps the jury did get the meat of what they wanted. How can I find out if they did?

The Court: Well, you can ask them and they can say yes or no here.

The Court: Does anybody want more?

(Jurors indicated it was sufficient.)

The Foreman: I think we found out what we were really after.

The Court: All right then. Very well. You may retire.

(At 5:45 P. M. the jury retired and continued its deliberations.)"

The jurors again were confronted with the testimony given by Michael Stone wherein there was a repetition of the fact that he had changed his story as told by him regarding the shortage of merchandise as he told it before the Grand Jury and as he told it to this jury—the trial jury. This emphasized again the proposition which was told to the jury by the Judge at pages 476-477:

"If any witness has wilfully testified falsely to any material fact, you may disregard all his testimony or you may accept such part of it as you believe worthy of belief—as appeals to your reason or judgment. Remember always, it is the quality of the evidence that counts.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility if any, as you may think it deserves.

The credibility of a witness is solely for you, the jury, to decide."

Whether there was sufficient evidence to support the conviction of the petitioner under Count II of the indictment.

In that connection, petitioner bitterly contests the statement made on page 3 of its brief reading as follows:

> "The person employed by Ellen-Joan Fashions as packer and shipper testified that on at least two occasions he had, on instructions from the petitioner, delivered dresses to buyers without making the charge slips which usually accompanied such deliveries (App. 29a-30a.)"

Mr. Whitted, the person in question, testified as follows at pages 188-189:

> "The Court: By the way, I assume when you took these goods, these dresses to Stan Rose, you got no receipt?
>
> The Witness: Yes, I got a receipt.
>
> The Court: You got a receipt?
>
> A. I got a receipt.
>
> Q. And whenever you took merchandise anywheres else would you get a receipt? A. That's right.
>
> Q. In other words, you get a receipt for the amount of merchandise you bring over. A. That's right."

On page 190:

> "Q. So far as you are concerned, do you know of the fact that in that building that you were in there were a lot of thieveries? A. Yes, but not on the premises where I was working at.
>
> Q. Well, the thieveries that took place in the building—
>
> The Court: Are you going to testify?
>
> Mr. Palmer: Not yet.
>
> The Court: Well, ask questions then.
>
> Q. Were there other dress concerns in the building? A. Yes.

Q. And to your knowledge were there burglaries of dresses in the building from time to time? A. Yes, there were burglaries." (Pages 188-189 of record of case on trial)

With regard to the statement concerning Mr. Freedman, accountant for the creditors, at page 5 of the Government's brief, indicates the fact that he was not an expert as claimed by the Government. To indicate his admitted errors, there appears the following in the cross-examination of Mr. Freedman by Mr. Palmer (This is the Mr. Freedman, who, on page 7, the Government says [whose competence the petitioner does not question]. This remark is ironical and not in accordance with the facts.):

"Q. Well, didn't you say yesterday, in response to a question, that there were three alleged discrepancies and finally you came down, it lasted for a while and then finally you came down to one discrepancy? Didn't you say that yesterday? A. There were three classes of inventory in which I found discrepancies and then with the work of Mr.

Q. You did use the word 'discrepancy'?

The Court: Let him finish.

A. Then after consultation and working with Mr. Stone, he was able to prove to my satisfaction that two of them were correct, not that the discrepancies were correct, but the inventory reconciliation ties up with the inventory on hand.

Q. You used the word 'discrepancy.' I didn't use it when you were on the stand. A. That's right.

Q. Which, after talking to Mr. Stone, which were you satisfied were not discrepancies any longer? A. The piecegoods?

Q. Yes. A. Piecegoods, and the cut lots sold to contractors and received from contractors.

Q. Now, as to the piecegoods, did you claim in the first instance that there was 11,000 yards short according to your rough calculation? A. I would have that in my work papers because once an error is found or is corrected from further information I make the changes immediately.

Q. I know but the error that was found was an error on your part, not his part, is that correct? A. Right.

Q. Now, so far as you are concerned, after you talked to him and checked back, with all these men, etc., etc., you discovered the fact that these errors were errors on your part, correct? A. Not mathematical errors. Errors of interpretation of the facts." (pp. 134-135 of the record of cases on trial)

And as to the statement made at page 6 of the Government's brief concerning the contention that the petitioner argued for the first time that the payments to Anita Stone in the amount of $2,200 were included in the $4,600 listed as repayments of loans to Michael Stone, and justified this by the fact that loan accounts of Michael Stone were combined in the company ledger.

It is interesting to note:

"Appellant now makes an argument, not put before the jury, which is quite persuasive as regards the March 25 and May 22 payments. This is that the loan account on the company's general ledger was a single account combining loans payable to Anita and Michael Stone and that analysis shows the two payments to Anita on March 25 and May 12 must have been included in the $4,600.00 recited in the statement of affairs as having been repaid to Michael 'since February 28, 1955.' However, this affords no explanation of the failure to report the $3,000 payment of July 19, 1954. It is, of course, entirely possible that if defendant's counsel had argued the disclosure of the March 25 and May 22 repayments to the jury as he has to us, the jury would not have found defendant guilty for failure to report a single payment made to Mrs. Stone nearly eleven months before; but this we can never know." (Circuit Court of Appeals - decision p. 45)

Yet, as to that particular statement, it is interesting to note that there was submitted to that Court on the rehearing, the following:

> "It was then respectfully submitted to that Court that it had overlooked appellant's argument that this $3,000.00 did not constitute a repayment of the loan which petitioner was required to list in answer to Item 10 of the Statement of Affairs in the Chapter XI proceeding. It was there mentioned to that Court that there was nothing in the Court's decision concerning that the analysis of the testimony of the Government's principal witness, David Freedman, and an examination of the books and records of the corporation showed that this payment to Anita Stone could not possibly have constituted a repayment of a loan. The Court also was shown that according to Government's Exhibit 22B, Government's Appendix 79A, the net balance due to Anita and Michael Stone from the corporation was the sum of $608.43 and the next item in that Exhibit affecting Anita Stone is a loan to the corporation by Anita Stone on May 14, 1954 in the sum of $10,000.00. On July 19, 1954 there then appears a payment to Anita Stone of $3,000.00. Finally, there appears the following statement at the bottom of the column entitled 'Additional Funds loaned to Company': 'Loans—Transferred to Paid in Surplus—August 25, 1954 . . . $10,000.00.' The journal entry in the books of the Corporation with respect to this last transaction as testified to by Mr. Freedman, showed that this sum of $10,000.00 was transferred from Loans Payable—Anita Stone to Paid in Surplus (R. 113, Appendix 34A, 35A.) Mr. Freedman testified that this transaction left an amount due from Anita Stone to the Corporation of $1,020.00. On the basis of this testimony and these entries in the books and records of the Corporation, it would be impossible to say the $3,000.00 paid to Anita Stone as a payment on loan since the $10,000.00 loaned by Anita Stone to the corporation on May 14, 1954 was transferred intact to Paid in Surplus.

> Now, if the $3,000.00 payment to Anita Stone had been applied in reduction of this $10,000.00 loan, this transaction could not have been so recorded since there would not have been $10,000.00 in the Anita Stone loan account to transfer to Paid in Surplus.
>
> In view of the uncontradicted testimony that Michael Stone was a general all-around salesman for the Corporation, had no knowledge of bookkeeping, had no knowledge of how the transaction involved in the conduct of his business were recorded, including the loan accounts, pro and con, and in view of the uncontradicted testimony that the schedules were prepared from information given by the bookkeeper of the defendant directly to the office of the attorney for the Bankrupt, how can it possibly be said that this transaction proved perjury on the part of Michael Stone."

Under these circumstances, with the accountant, Mr. Freedman, making these admissions as to his own errors of interpretation, can not this error of interpretation go to the question of his interpreting that the $10,000.00 put in the business by Anita Stone and later on charged to Paid in Surplus, must have proved that the $3,000 was properly accounted for on the books, and that there was insufficient evidence to support the conviction of the petitioner under Count 2 of the indictment. This decision itself based upon the theory of theoretic concealment is in violation of the decisions of the Supreme Court of the United States.

Does not the language of this Court in the *Kotteakos v. United States*, 66 S. Ct. 1239, at 1248; 328 U. S. 750, state truly represent the right on the part of this defendant for a new trial wherein the question of the prejudices created against him in the trial at large cannot exist:

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the jury

ment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Respectfully submitted.

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Statute Cited

Section 152, Title 18, U. S. C. 1

Supreme Court of the United States

OCTOBER TERM 1960

No: 514

MICHAEL STONE,

Petitioner.

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to reconsider its denial of his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, affirming petitioner's conviction on two counts of an indictment, charging violations of Section 152, Title 18, U. S. C.

POINT I

The instant case does not come within the rule that a judgment of conviction on a multicount indictment will stand if the conviction under any of the counts is sufficient to support the judgment.

Petitioner submits that in denying his petition for a writ of certiorari, this Honorable Court may have been swayed by the line of cases which hold that ordinarily a judgment of conviction will stand if the conviction under

any of the counts is sufficient to support said judgment and the sentence thereunder. Petitioner is of the opinion that if he had indicated to this Honorable Court that there is a clear distinction to be drawn between this line of cases and the instant case, this Court would have granted his petition for a writ of certiorari.

Thus, the writer has examined most of the cases which enunciate this well-established rule and found that, in each instance, the error which would have necessitated a reversal of the conviction on one of the counts of the indictment pertained only to the evidence adduced in support of that particular count of the indictment. In the instant case, however, the admitted prejudicial error committed by the Trial Court affected the entire case, since the failure to permit the defendant to rehabilitate himself by the use of the entire Grand Jury minutes, after his improper impeachment by the prosecuting attorney, had the ultimate effect of (1) tainting the defendant's entire testimony given at the trial and of supplying the elements of willfulness and fraudulent intent required to be proven by the prosecution; and (2) depriving the defendant of a fair trial.

In examining the myriad of cases cited in support of the proposition that if one count of the indictment is sufficient in itself to support the judgment, error occurring in another count of the indictment will not necessitate a reversal, the writer was unable to discover a single case in which the error complained of involved the character and credibility of the testimony of the defendant. The error in each of these cases was limited in its effect to one particular count of the indictment and did not infect the evidence adduced in support of the other counts of the indictment.

Cf: *Lawn* v. *U. S.*, 355 U. S. 339; 78 S. Ct. 311;
Hulahan v. *U. S.*, 214 Fed. 2d 441;
Gantz v. *U. S.*, 127 Fed. 2d 498;
Bowen v. *U. S.*, 153 Fed. 2d 747;
Hausbrough v. *U. S.*, 156 Fed. 2d 327.

In the instant case, however, the error necessarily affected the jury's appraisal of the credence to be given to defendant's testimony under both counts of the indictment and could not be insulated to the first count, in connection with which the error was committed. The case most nearly akin to the instant case is *U. S. v. Samuel A. Carmel*, 267 Fed. 2d 345, in which the defendant was indicted under three counts of an indictment charging him with theft of two automobiles and a conspiracy to commit these offences. In reversing defendant's conviction on all counts, the Court of Appeals held that in view of the fact that all the evidence presented a close case to the jury, the unjustified and extensive intervention of the Trial Judge constituted prejudicial error, and the Court of Appeals made no attempt to determine the effect of this prejudicial error upon the individual counts of the indictment. In the instant case, it has been shown that the Court of Appeals found that there was barely enough evidence to send Count 1 to the jury and that the prejudicial error committed by the Trial Court would have necessitated a reversal of this count if it stood alone. With respect to Count 2 of the indictment, the Court of Appeals stated that petitioner had made a quite persuasive argument as respects two of the three payments in question, and that it is entirely possible that if the disclosure of these two payments had been argued to the jury, the jury would not have found defendant guilty for failure to report a single payment made nearly eleven months before.

Thus, it is apparent that the facts in the instant case presented a close case to the jury and that any prejudicial error committed at the trial might easily have affected the jury's final determination.

In the case of *McDonald, et al. v. U. S.*, 335 U. S. 451, 69 S. Ct. 191, this Honorable Court held that the error committed in the admission of illegal evidence against one of several defendants cannot be isolated to that defend-

ant and required the reversal of the conviction of all defendants. To the same effect see:

McKnight v. *U. S.*, 183 Fed. 2d 977, 979;
Nelson v. *U. S.*, 208 Fed. 2d 505.

In the latter case, the Court found that the denial of the defendant Nelson's motion to suppress infected the cases of the other appellants since all were tried jointly and that the Court did not and, as a practical matter, could not limit the jury's consideration of the unlawfully seized evidence to the defendant Nelson alone.

This zealousness to protect the interests of additional defendants whose interests may have been affected by prejudicial error which involves only one of the defendants should, petitioner submits, extend to the instant case where the prejudicial error infected both counts of the indictment equally, against a sole defendant.

POINT II

The decision of the Court of Appeals in the instant case is in conflict with the Court of Appeals for the Sixth Circuit and with its own prior decisions.

There is even a conflict of decisions with respect to the rule stated above that where a defendant is convicted on two or more counts of an indictment and concurrent sentences are imposed, the judgment will stand if the conviction under any of the counts is sufficient to support the conviction and judgment thereunder. Thus, the Court of Appeals for the Sixth Circuit, in the case of *Robinson* v. *U. S.*, 30 Fed. 2d 25, reversed all four counts of an indictment, although the convictions upon these four counts were affirmed, stating, at pages 29 and 30, as follows:

> "Thus we develop a single trial upon nine counts, with a single verdict of guilty, and a finding of no error as to four counts, and reversible error as to

five. Under the circumstances of this case, the imprisonment sentence upon the four counts having been deemed by the trial judge to be appropriate punishment also for the five, we are not clear that the sentence as to the four ought to stand and at the same time a new trial be had as to the five. See Blitz v. U. S., 153 U. S. 308, 318, 14 S. Ct. 924, 38 L. Ed. 725; Ballew v. U. S., 160 U. S. 187, 203, 16 S. Ct. 263, 40 L. Ed. 388; Putnam v. U. S., 162 U. S. 687, 714, 16 S. Ct. 923, 40 L. Ed. 1118; Johnson v. U. S. (C. C. A. 7), 215 F. 679, 684, 687, L. R. A. 1915A, 862. The intimation to the contrary in De Jianne v. U. S. (C. C. A. 3), 282 F. 737, 742, does not seem to be supported by the cases therein cited.

The convictions and sentences upon the first five counts are reserved, the convictions upon the last four counts are affirmed, but the sentences thereon are reversed, and the case is remanded for further proceedings * * *."

Even the Court of Appeals for the Second Circuit has found that this is not a hard and fast rule and in the case of *U. S. v. Hines*, 256 Fed. 2d 561, stated at page 563, as follows:

"Putting aside, however, what appears to be error in holding the Claassen rule controlling in cases of this sort, the Supreme Court has made it clear that the rule is not a hard and fast one, but rather a matter of discretion. For at least on one occasion it reversed convictions on some counts of a multicount indictment where concurrent sentences had been imposed. Putnam v. United States, supra, 162 U. S. 687, 16 S. Ct. 923. See also Robinson v. United States, 6 Cir., 30 F. 2d 25, and United States v. DiCanio, 2 Cir., 245 F. 2d 713, certiorari denied DiCanio v. United States, 355 U. S. 874, 78 S. Ct. 126, 2 L. Ed. 2d 79 * * *."

It is therefore respectfully submitted that the decision of the Court of Appeals in the instant case not only conflicts with the decision of the Court of Appeals for the Sixth Circuit in the *Robinson* case, cited *supra*, but also conflicts with its own decision in the case of *U. S. v. Hines*, cited *supra*.

POINT III

The jury's consideration of Count 2 of the indictment was clearly affected by the errors committed by the Trial Court.

The Court of Appeals said that it would have reversed the conviction on Count 1 if it stood alone. It is petitioner's contention that the jury would never have convicted petitioner on Count 2 if Count 1 was not submitted to the jury tainted by the prejudicial error because:

1. The jury did not look at the books and records because it was convinced of defendant's guilt on Count 1 by reason of the prejudicial error above mentioned;

2. Without this prejudicial error the jury could not have been so convinced of his guilt, and would have examined the books and records as requested, and would have found that there was nothing concealed and that petitioner was innocent of Count 2.

Since the Court of Appeals in its decision stated: "• • • we cannot believe the one error to which proper objection was taken, namely, the failure to make the grand jury minutes available, prejudicial as we hold this to have been with respect to Count 1, carried over to the wholly different transactions charged in Count 2 • • • ", may not the following be considered as a further proper ground for this Court to grant the writ of certiorari prayed for on this rehearing: On page 76a of the government's Appendix there is only a portion of the statement of affairs included (govt's Exhibit 1), which portion is item 10 and item 13 of the statement of affairs. (Item 13 was not attacked in the indictment. The defendant duly testified that the person who prepared the schedules could not answer in the affirmative as to thefts in the premises, because there was no proof of the same to submit to the police department or the insurance company.) Item No. 14 is not

included. Annexed hereto is a copy of the entire statement of affairs (govt's Exhibit 1).

The Court is asked to consider item 14, "Withdrawals" (referring to personal withdrawals, including loans, which have been made during the year immediately preceding to officers and directors, etc., which would include Anita Stone) and the answer thereto, "As appear in the books and records" in light of the fact that those books and records disclose fully the Anita Stone and other loan accounts; those books and records are in evidence; the jury refused to examine those books and records and so informed the Court.

This shows that the jury's mind must have been affected by the prejudicial error of the Court as herein complained of and the overruling of defendant's counsel's objection to charge No. 10 in the form set forth, as requested by the District Attorney (Appellant's App. 108a, 109a), which reads as follows:

> "The statement contained in item 10 of the statement of affairs in the petition in proceedings under Chapter 11 of Ellen-Joan Fashion Co. was material as a matter of law."

This charge as requested did not take into consideration item No. 14, which according to the statement of affairs would include Anita Stone as president and director of the corporation nor the language of Count 2 itself. The jury therefore must have given its attention solely to item No. 10.

This is plainly shown in another way. When the jury came back to court at the beginning of its 8 hour session, it said it did not want the books of account. Apparently the Judge's charge and the argument concerning the submission of the Grand Jury minutes to defendant's counsel had so affected the minds of the jurors at large, that once they had come to the conclusion of finding him guilty on one count of the indictment, that there was no necessity